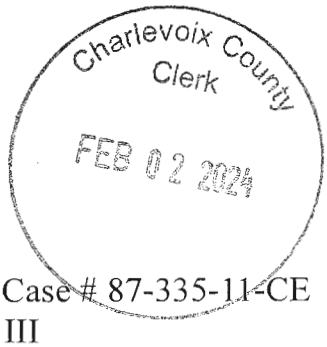
State of Michigan
Charlevoix County Circuit Court



H & D Inc and its successor **Rieth-Riley Construction Co Inc**,
Plaintiff

v

Charlevoix Circuit Case # 87-335-11-CE
Hon Roy C. Hayes III
Complaint: 2-12-87
First Amended Complaint: 3-18-88
Petition: 4-17-23

Hayes Township, a municipal corporation,
Defendant

and

JoEllen Rudolph, Kathy Martinchek, Victor Martinchek, and Kevin Willis
Intervenors-Petitioners
_____/

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Intervenors' Hearing Brief – Corrected
(Only correction: Attachment 1)

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I. Introduction

This case concerns mining of sand, gravel, and aggregate (collectively "gravel") by Plaintiff Rieth-Riley, successor to the interests of Plaintiff H&D Inc, in Phase VII of the "Green Pit" near historic Bay Shore, on the south side of US31 between Charlevoix and Petoskey.

Of principal concern is the lifetime of the mine and particularly Phase VII. Petitioners do not seek merely to compress mining activity to a shorter period. Rather they seek to stop it, for having violated the Consent Judgment.

Other violations concern non-overlapping of Phases, perimeter fencing/berms, and Townline/PinCherry haulage routing. Though vibrations which shook a nearby home in 2023 receive brief mention below, they constitute a separate tort not a specific violation of the Consent Judgment.

A. Hearing testimony on November 20 and December 14

Per its custom, the Court made seven video recordings of those hearings. Petitioners purchased copies. File names of the videos are in the footnote.[1] Each video continuously displays the date and time of day. For easy reference, in this brief each is correlated chronologically with a numbered abbreviation 1-7 assigned by Petitioners.

1 Video 1: *2023-11-20_09.05.06.867.wmv*
Video 2: *2023-11-20_11.08.38.900.wmv*
Video 3: *2023-11-20_13.32.04.718.wmv*
Video 4: *2023-11-20_16.20.03.907.wmv*
Video 5: *2023-12-14_13.58.55.833.wmv*
Video 6: *2023-12-14_14.43.28.979.wmv*
Video 7: *2023-12-14_17.05.57.730.wmv*

By email of December 1 Petitioners offered to provide the recordings to the other Counsel; the next day both declined.

This brief will quote witness testimony, transcribed from the videos by undersigned counsel, referred to first by video number and second by counter number of the beginning of the passage quoted. Though counsel is not a professional court reporter, Petitioners trust that the Court and parties can verify the accuracy of the quotations by listening to the videos at the indicated counter numbers.

If professional transcripts eventually become needed, people can be retained to do the job.

B. Attachments to Brief

Attachment 1: Hearing Exhibit 4, Exhibit D, Consent Judgment September 91, 1991
Attachment 2: Hearing Exhibit 15, Map of Green Pit and Surrounding Property
Attachment 3: Hearing Exhibit 7, Jim Rudolph Gantt Chart, Visualization of Rieth-Riley Claimed Timeline
Attachment 4: MSHA Presentation, https://www.msha.gov/sites/default/files/EquipmentGuardingConveyorBelts2010.pdf , "Guarding Conveyor Belts at Metal and Nonmetal Mines", Page 33 of Presentation, "Plastics"
Attachment 5: Hearing Exhibit 19, Photo 1 of 6, Rieth-Riley Fencing at Green Pit
Attachment 6: Hearing Exhibit 19,Photo 2 of 6, Rieth-Riley Fencing at Green Pit
Attachment 7: Legible Copy of Final Grading Plan, Depicted on Hearing Exhibit 4 Exhibit C

II. Statutory/regulatory governance

A. Hayes Township

The Township has a downloadable Zoning Ordinance.[2] The Company mining expert Ethan Belden recognized ordinary township authority, in testifying to differing regulations of the townships throughout Michigan.[3] However in July 1991 Judge Pajtas refused Intervenors' objection to an amended Consent Judgment, an objection premised on the Hayes Ordinance. The Court held that reliance on the Ordinance would render the 1989 Judgment "meaningless."[4]

B. MSHA

The federal government also regulates gravel mining. It does so through the Mine Safety & Health Administration ("MSHA"), at 30 USC and 30 CFR. MSHA regulations are occupational in focus. They give MSHA no power over perimeter fencing, or berms, or vibrations at gravel sites. The closest they get is:

30 CFR § 56.9300 (berms or guardrails along steep banks of roadways)

30 CFR § 56.9301 (dumping locations)

30 CFR § 56.11002 (handrails and toeboards along crossovers, elevated walkways, elevated ramps, and stairways)

30 CFR § 57.9300(a) (steep banks of roadways)

30 CFR § 57.9301 (dumping locations).

2 *https://www.hayestownshipmi.gov/wp-content/uploads/2022/10/Hayes-Township-Zoning-Ordinance-with-Amendments-as-of-012122.pdf*

3 Video 7 starting at 1:44.

4 Hearing Exhibit 14, p 5.

30 CFR § 75.1711 (sealing of openings at abandoned coal mines)

30 CFR § 77.2(d) (coal mines, definition of a berm)

30 CFR § 77.214(d) (fencing at refuse piles).

C. Michigan

Other than a permit needed for a crusher,[5] which in this case is located at the Bay Shore pit a mile away from the Green Pit, the State does not regulate gravel mining in any way. The closest it comes is regulation of sand dune mining[6] and hard rock mining.[7]

III. Key passages in Consent Judgments[8]

A. The September 1991 Judgment[9]

Exhibit D, "Schedule of Mining and Restoration":
Attachment 1.

Paragraph 1:
"In addition, and attached hereto and marked Exhibit B, is the Mining and Reclamation Program. The Mining and Reclamation Program states with specificity the activities which are to be undertaken in each phase. Plaintiff H & D, Inc. shall remove in order of the numbered Phases I through VII, However, Plaintiff H & D, Inc may remove resources from Phase V during Phases I, II, III and IV, but only as necessary to allow required blending and obtain select sands and gravel."

Paragraph 10:
"Any optional approaches to mining the site, which are identified in the Mining and Reclamation Program [Exhibit B] may be elected at the sole discretion of Plaintiff H&D Inc."

5 MCL 324.5505, 5506, 5524(3)(v).
6 MCL 324.63701 et seq.
7 MCL 324.63301 et seq.
8 Emphasis added to the following passages.
9 Hearing Exhibit 4.

Paragraph 11:

"A proposed Schedule of Mining and Restoration is attached hereto and marked Exhibit D. This Schedule is advisory only and reflects the goals of the parties in attempting to both mine and restore the subject lands. This Schedule is projected based upon past need for gravel by Plaintiff H&D Inc in supplying various development activities in northern Michigan. Should the demand change significantly upward or downward, this Schedule may be accelerated or decelerated depending on the needs of the industry and Plaintiff H&D Inc in particular."

Paragraph 13:

"Any open mining face which is higher than three (3') feet shall have fencing placed on the top of the same in such manner as to guard against persons unfamiliar with the site from falling over the working face. Such fencing shall be at least four **(4')** feet high, and shall consist of at least a woven wire farm fence,"

Paragraph 14:

"Truck access to the subject lands shall be through the Umlor and Emmet County Road Commission properties abutting the subject property to the northwest. Ingress and egress by PinCherry or Townline Road is prohibited for haulage vehicles, It is the clear intent of tho parties that haulage to and from the site shall be conducted over the easements on adjoining lands as opposed to the county roads. Any truck entering or leaving the site shall be operated in such a manner as to reduce the likelihood of ambient dust."

Paragraph 18:

"In the event that the Emmet County Road Commission gravel pit is exhausted of resources at or before the time of final closure of the land being mined by Plaintiff H&D under this Consent Judgment, with the Emmet County Road Commission's permission, H&D Inc shall grade the lands owned by Emmet County to the final contours as shown on the final Grading Plan which is marked Exhibit C. H&D shall not be required to place top soil on the Emmet County lands and neither shall it be required to seed such lands as a part of closure. If the gravel pit owned by Emmet county has not had all resources removed from it at the time H&D Inc undertakes final closure of its lands, H&D Inc shall have no responsibility for final grading the Emmet County properties. The determination as to whether the resource in the Emmet County Road Commission gravel pit has been exhausted shall reside solely in the Emmet County Road Commission."

Paragraph 20:

"Plaintiff H&D Inc shall secure and deposit with the Township a bond equal to the final closing cost of each phase. The bond will be maintained until that phase is closed. By way of example, initially a bond will be secured for Phase I which represents the final closure costs of Phase I. Under the closure plan, Phase I will be closed while Phase II is in operation. Therefore, for a certain period of time there will be two (2) bonds necessary, one maintained until Phase I is finally closed and one for Phase II while the same is being worked. This progression will continue throughout the project as each phase is respectively opened and closed."

Non-optional requirements in Exhibit B, "Mining and Reclamation Program":

Phase II:

- "Shaping, placing topsoil and seeding of Phase I area accomplished as proceeding with Phase II."

Phase III:

- "Shaping, placing topsoil, and seeding of Phase II are accomplished as proceeding with Phase III."

Phase IV:

- "Shaping, placing topsoil, and seeding of Phase III areas accomplished as proceeding with Phase IV."

Phase VI:

- "Shaping, placing topsoil, and seeding of Phase V are accomplished as proceeding with Phase VI,"

Phase VII:

- "Shaping, placing topsoil, and seeding of Phase VI areas accomplished as proceeding with Phase VII."

Optional approaches in Exhibit B, "Mining and Reclamation Program":

All phases:

- "Strip topsoil one to two years ahead of mining."

Phase V:

- "Phase V removals will be allowed during Phases I, Il, III and IV but only as necessary to allow required blending to produce specialty products and obtain select sands and gravels."

Phase VII

- "Final shaping of some parts of phases may have been already accomplished."
- "Contoured berms to be removed . . . may start before mining completely accomplished in Phase VII."

B. The Pajtas ruling of 7-16-91[10]

[Page 2] "Professor Anthony Bauer . . . prepared revised . . . Schedule of Mining . . . to incorporate the expanded area in conformity with paragraph 15b of the amended consent judgment.

. . .

[Page 3] "Thomas R. Irwin, president and chief executive officer of the plaintiff [H & D Inc] established that the revised plan would not extend the mining in terms of the time for extraction. He further stated that the expanded area should be mined as the next phase, described as 'Phase 1A', so as to better facilitate reclamation of the area. To mine Phase 1A later would cause a disturbance to Phase 1 area and would not meet the contour of Phase 1. Further, he testified that it would be cost effective and efficient to follow the mining of Phase 1 with Phase 1A instead of going into the other phases."

. . .

[Page 5] "If the plaintiff [H&D[] shows, after a due process hearing, that the proposed expansion is harmonious and comports with the existing mining plan, the contemplated expansion is approved without more regarding zoning compliance. . . . Similarly, the Court is bound by the parties' agreement as embodied in the consent judgment with respect to development phasing. The record before the court, as well as the term of the consent judgment, fail to persuade this Court to interfere with the timing of the development as agreed to. . . . In conclusion, the Court finds that the proposed expansion may be mined in a manner so as to make Phase 1A blend harmoniously with the existing development and reclamation plan."

C. The 1989 Judgment[11]

Paragraph 1:

"Any optional approaches to mining the site, which are identified in the Mining and Reclamation Program [Exhibit B] may be elected at the sole discretion of Plaintiff H&D, Inc."

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10 Hearing Exhibit 14.

11 Hearing Exhibit 2.

Paragraph 15:

"If, during the executory life of the mineral extraction and land reclamation plan incorporated herein, Plaintiff acquires mining rights by written lease, deed, option or contract to contiguous property to the west of the present site, up to and including all property presently owned by Carl Price, as described in the attached Exhibit E, such property may be mined in a manner so as to make the new sites blend harmoniously with the existing development and reclamation plan herein; provided, however, all of the following requirements are met with respect to such additional mining and/or required amendment to the existing development and reclamation plan:"

15(b): "The preparation by A. Bauer of . . . revised Schedule of Mining . . . to incorporate the new parcel(s). Such revisions [of the Operations Plan, Mining and Reclamation Program, Schedule of Mining, Restoration and Grading Plan] shall be consistent with the elevations[,] phase progressions and other details of the exhibits as presently prepared and shall harmoniously integrate the new site{s) therein."

15(g): "In the event that the Court determines that there is substantial conformity with all requirements and standards as provided in this Consent Judgment, such amendment, revised plan or additional mining activity shall be integrated within the existing Development and Reclamation Plan, with any modifications or conditions included therein. . . ."

"In the event that the Court determines that there is substantial conformity with all requirements and standards as provided in this Consent Judgment, such amendment, revised plan or additional mining activity shall be integrated within the existing Development and Reclamation Plan, with any modifications or conditions included therein, and such shall become part of this Consent Judgment, and any Exhibits thereto shall be attached to this Consent Judgment as if originally made a part thereof."

IV. History

A. The Township denies a Special Use Permit, H&D sues, CCBSA is formed, and a series of Consent Judgments is entered

According to mining expert Belden, the Green Pit property was purchased by the

Company's predecessor H&D in 1955, and there has been mining in the area since 1952.[12]

Reith-Riley, an employee-owned Employee Stock Ownership Plan (ESOP), acquired H&D's interests in 2005.[13]

The Pit and surrounding area (including an adjacent pit owned by Emmet County) is seen in the Google map prepared by Janet Simon.[14]

On April 25, 1986, the Company applied for, and on June 17, 1986, the Township denied H&D's application for a Special Use Permit for gravel mining.[15] H&D began this lawsuit on February 3, 1987. Intervenors were not named as parties. A Consent Judgment was entered in 1988.[16] It incorporated a "Schedule of Mining & Restoration" according to which mining and restoration would both end 25 years from 1988.

Then 35 individuals moved to intervene to oppose the mining. At a lengthy hearing of July 11, 1988 (the transcript of which is in the Court file), Judge Pajtas took the unusual step of granting the intervention motion, even though it was post-judgment.

The parties including Intervenors agreed to the second Consent Judgment in 1989.[17] Qualified by ¶ 11, it incorporated a "Schedule of Mining & Restoration" according to which mining and restoration would again end, in 25 years.

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12 Video 6 starting at 2:10:56.
13 Video 2 starting at 27:10.
14 Hearing Exhibit 15 (Attachment 2).
15 Court Transcript of Intervention Motion, 7-11-88.
16 Hearing Exhibit 1.
17 Hearing Exhibit 2.

JoEllen Rudolph was then president of Concerned Citizens of the Bay Shore Area (CCBSA), and one of the lead intervenors. Her role was to keep in touch with the attorneys, survey the Community about residents' desires, attend meetings of CCBSA leadership with H&D President/CEO Tom Irwin, preserve records of the case, and publish a newsletter with a press run of 150.[18] The survey disclosed a top Community priority was that "H&D will close the gravel pit and stop mining in no more than10 years."[19]

The 1989 Judgment eliminated the on-site crusher which the 1988 Judgment had allowed, and substituted fencing language as described below. The company agreed to re-locate PinCherry Road, but only temporarily, not permanently, provided Charlevoix County approved.

In March 1991 the Company petitioned to add three nearby parcels to the 1989 Consent Judgment, thus triggering the requirements of ¶ 15 of that Judgment.[20]

After the all-day hearing of 4-29-91, Judge Pajtas allowed the additions, commenting as noted above that H&D's Irwin established in testimony that "the revised plan would not extend the mining in terms of the time for extraction," The Judge also refused "to interfere with the timing of the development as agreed to."

As noted, though Professor Bauer prepared the revised Schedule of Mining, he was not the one actually to "project" the Schedule. It was projected by H&D.

18 Video 6 starting at 1:55, 20:16.
19 Video 6 starting at 20:36.
20 Referred to as the Drewanz, Graybiel, and Price properties.

There had to have been a factual basis for Judge Pajtas's finding that the "timing" of the development was "agreed to." A transcript of the 4-29-91 hearing (if there was one), and Lugene York, the Reporter, are unavailable. Intervenors believe the factual basis must have been stated or confirmed by testimony Judge Pajtas heard at the hearing.

The Opinion highlighted and tracked the 1989 Judgment's ¶ 15 and its seven procedural sub-paragraphs. These included ¶ 15(b)'s required "consistency" with the 1989 exhibit "details" (using the word "shall"), 15(g)'s "integration" of mining of the new lands within the existing Plan, and ¶ 15(g)'s "substantial conformity" of the proposed changes with all ¶ 15 "requirements."

Importantly, one of the 1989 "exhibits" was a Gantt Chart showing a 25-year maximum.

Pajtas added that the burden was on the Company to "show" that the proposed expansion "comports" with the existing mining plan.

Phase 1A was before the Court when it ruled in July 1991. Under the third Consent Judgment, that of August 1991, it was to be mined between Phases I and II.[21]

But in the Judgment of September 1991 – the fourth and most important Judgment – the Company re-named "Phase 1A" as "Phase V," to be mined after Phase IV. And it added an "optional approach" which allowed it to extend the mining of Phase V at the front end into Phases I – IV, but only to obtain certain "select" materials for "specialty products." One paragraph and three Exhibits provided for the change.

21 Hearing Exhibit 3.

A new Judgment was needed to accomplish this extension. This was because under ¶ 10 of the August 1991 Judgment the parties considered extension of Phase V was not an allowed "optional approach." Nor was it thought to be a ¶ 11 "acceleration."

The Gantt Charts of both August and September 1991 indicated all mining was to end by the 25th year. Which is to say, the Phase V extension did not affect the overall "agreed-to" timing of the development. The extension in September 1991 was signified by the dotted line of that Chart (Attachment 1). Jim Rudolph, who regularly works with Gantt Charts testified:

> In effect, where I really get focused on is Phase V in the fact that there is no line at the left end, and there's dots, that they can signify that that they [the Company] are not certain of that. That project might take and start much earlier.[22]

Also with everyone's consent, in September 1991 the timing of the move of PinCherry Road was changed from being an option during either Phase I or II, to a mandatory rebuilding during a new Phase VI in which mining in the road corridor would occur first. Like the change for Phase V, this required revision of Exhibit B and other exhibits.

The 1991 Judgments contemplated annual onsite inspections and written reports by Bauer, at company expense,[23] an independent landscape architect, to assure compliance.[24] His reports are collected in Hearing Exhibit 20.

By the 1996 report, mining had started in Phase IV but in the end not much gravel

22 Video 1 starting at 1:05:47 (emphasis added).
23 Hearing Exhibit 4 ¶ 22.
24 Hearing Exhibit 4 ¶ 20.

proved to be there.

The 2004 Report indicated inspections would be changed from an annual basis to a request-of-the-township basis, a change to which Intervenors agreed.[25]

Since the time of the Consent Judgments most Intervenors have died or moved away. But several remain including the four Petitioners.

B. Continued mining after 25 years, and the Bauer report of September 2022.

Contrary to Rieth-Riley Counsel at the November hearing, Bauer's September 2022 Report did not say the Company "likely exceeds"[26] the requirements of the September 1991 Consent Judgment. It said merely that operations were being conducted "in accordance with" the Judgment and the Township's expectations.[27] Bauer was not in any sense an arbitrator whose findings "should be "conclusive" – so termed by Reith-Riley[28] – on the Court. According to the very last paragraph of the Judgment, it was the Court which was to "insure compliance."

JoEllen Rudolph however – who along with Tori Fisher had tried to attend every inspection[29] and managed to collect 17 records of the inspections over the years[30] – had not been informed or invited to the 2022 inspection.[31] Had she been present she would

25 Video 6 starting at 8:58.
26 Video 1 starting at 14 :01.
27 Hearing Exhibit 8.
28 Video 1 starting at 13:58.
29 Video 6 starting at 5:46.
30 Video 6 starting at 8:25.
31 Video 6 starting at 11:39, 31:47, 36:18.

have countered the contention that the Company's fencing and its life-of-the-mine positions were satisfactory,[32] On the latter issue she had made presentations to the Township Board in 2019 and 2022. (In those presentations she mistakenly argued the mine was allowed only for 30 years not 25, but either way the Company had exceeded the limit.[33])

Though in 1996 mining had started in Phase IV, in 2022 the Bauer report said Phase IV had limited reserves and was unlikely to be mined. The reports do not indicate just when mining ended in Phase IV. All Jim Pemberton (the Company's Petoskey area manager) knew was the Company was not mining there currently.[34]

As seen by the Judgment's bond language,[35] the Mining and Reclamation Program,[36] and the Schedule,[37] the Judgment required all the Phases to overlap. Unlike H&D, Rieth-Riley didn't do overlapping, which was mandatory, pertinently in this case between Phases VI and VII. The 3-point program for Phase VI[38] required that it be mined before the re-location of PinCherry. The re-location was finalized in 2009.[39] This means that Phase VI was mined before 2009. Pemberton confirmed this in his testimony:

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32 Video 6 starting at 17:24.
33 Video 6 starting at 27:54.
34 Video 6 starting at 1:25:07.
35 Hearing Exhibit 4, ¶ 20.
36 Hearing Exhibit 4, Exhibit B.
37 Hearing Exhibit 4, Exhibit D.
38 Hearing Exhibit 4, “Mining and Reclamation Plan,” Phase VI, Point 3.
39 Video 2 starting at 44:05.

> Phase VI was mined, and when it was completed, PinCherry Road was re-located to the Phase VI area, so in that sense it is reclaimed.[40]

Phase VII, the next one, was then delayed for 10 years, at least according to Simon's testimony about the 2019 suicide attempt, noted below.[41]

C. The Company announcement of 36 more years of mining, followed by the Petition

Petitioners initiated the present petition this last April 17.

It was occasioned by Pemberton 's remarks at a Township meeting on April 6, recorded by Township resident LuAnne Kozma. He was prompted by questions initially from JoEllen Rudolph. He said:

> In general, we've been mining, extracting about 50,000 tons, plus or minus, per time-in. Our plan is to come in, and from the economics, try to get at least a 3-year supply, 3 to 4-year supply of gravel in one extraction operation. That way we're not going in and out every year. Economically speaking, that's the best cost, ok? So if we got 600,000 tons left, and we extract, say average 50,000 tons per time we extract, if it averages 3 years, then that's 36 years.

Continuing, he was interrupted by audience member Jim McMahon:

> McMahon: "Could you repeat that? How many – ? Did you say 36 years left of mining?"
>
> Pemberton: "That's correct."[42]

Though Pemberton included "if – then" at the end of his above answer to Rudolph, he did not repeat "if – then" to McMahon, nor did he use the word

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40 Video 6 starting at 1:30:23.
41 Video 3 starting at 2:18:24.
42 Video 1 starting at 27:08.

"hypothetical" in answering either of them.[43]

The 36-year figure was a shock to the audience, and Pemberton made no attempt to mollify it. In 1991 H&D had projected Phase VII to last just five years, ending around 2012.[44] Continuing Phase VII 36 more years from 2023 would mean extending it to the year 2059. Reclamation would not start till then, when all Petitioners will most likely be dead.[45]

At the November Court hearing the Company reduced[46] the anticipated amount of tonnage remaining from 600,000 (the figure Pemberton had said on April 6) down to 450,000, which – using the same protocol of 50,000 tons every 3-4 years – would extend mining 27 more years,[47] still past the end of Intervenors' likely lifetimes.

The reduction of expected remaining tonnage was deduced, Pemberton said, by Belden and

> "new and better and more sophisticated equipment that would help to determine quantities of material."[48]

On April 14 Township Counsel Todd Millar wrote Company Counsel Keegan Brennan:

> We are currently in year 35 of the mining operation pursuant to the consent judgment. Rieth-Riley indicated that the amount of material estimated to still be on site suggested that the mine could be viable for another 36 years. The

43 Video 6 starting at 29:16.
44 Video 3 starting at 26:01.
45 Video 2 starting at 12:34.
46 Video 1 starting at 1:35:01.
47 Video 3 starting at 19:43.
48 Video 1 starting at 1:35:50.

> Township does not believe that a 71-year life span for this operation was contemplated by anyone in 1989 when the consent judgment was approved by the intervenors.[49]

D. Mining during the litigation

After the years had passed, some mining continued in the Pit. To quantify it, the company offered Hearing Exhibit 18 which consisted of two parts.[50] The main part is contemporaneous truck tickets of gravel hauled from the Green Pit across US31 to the Bay Shore Pit in 2012-2023. Attached to that part is a set of summary sheets of the main part. Neither part identifies which Phase the material actually came from, nor did Pemberton's testimony.

The Exhibit shows the total tonnage for that period was insignificant until 2023. In that period, it totals in sum to less than what the Company extracted in just two months, September-November, in 2023. See the Chart below. Because the mining was minimal until 2023, the Intervenors decided not to contest it.[51]

But in 2023 Rieth-Riley mined Phase VII in April-June, starting a few days after the April 6 meeting. On March 13 at a meeting Pemberton had estimated the truck traffic would average some 90 truckloads a day,[52] a figure the Company says it disputes.[53] But according to the Chart below at the end of this section, Pemberton's figure was about right.

49 Hearing Exhibit 10 (emphasis added).
50 Video 6 starting at 1:02:12, 1:03:25, 1:05:11, 1:05:28, 1:07:00.
51 Video 6 starting at 11:20, 34:18.
52 Video 6 starting at 1:08:07.
53 Video 5 starting at 29:48.

The truck tickets of the April-June period are separated out in Hearing Exhibit 18. The Chart below analyses the data, and shows mining occurred on 38 days, a total of 2952 truckloads were hauled away, which summed to a total of 87,188.05 tons. At $2/ton[54] the result was anticipated profit of $2 x 87,188.05 = $174,376.10 for Rieth-Riley.

The Chart summarizes other data in Hearing Exhibit 18. However there is a problem with the Exhibit. It was allowed into evidence, with the proviso that if errors were detected later they could be noted in this brief.[55] Pemberton testified the Exhibit was the "truck tickets for the years material was extracted out of the Green Pit and hauled to the Bay Shore Pit.[56] But on review it now appears that for the year 2019 most of the truckloads and tonnage did not involve the Green Pit, but rather some place called "Prison Run." Charlevoix County has no prisons.

In September the Company went back on what it told the Township on April 6 – that it would mine only every 3-4 years – and began a new 2-month round of mining. As seen in the Chart it hauled quite a bit more in the fall than in the spring of 2023, prompting the Court to remark "well it sounds like they've been mining like crazy for the past 12 months, right?"[57]

Just in 2023 the Company's anticipated profits sum to $430,188.08.

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54 Video 1 starting at 1:37:22.
55 Video 6 starting at 1:09:45.
56 Video 6 starting at 1:03:31.
57 Video 7 starting at 22:42.

The Company estimates it took 40% of the remaining Phase VII gravel between June and November.[58] That would leave 60% – not much when considering the Green Pit as a whole – which is still there today.

Hearing Exhibit 18 Data Summary[59]

Period	Days worked	Truckloads	Tons in period	Profit
2012	8	1,065	34,302.72	$68,603.44
2015	10	1,206	41,475.66	$82,951.32
2019	10	1,316	41,484.29	$82,968.58
April-June 2023	38	2,952	87,188.05	$174,376.10
September-November 2023	35	3,586	127,905.99	$255,811.98
Total	101	10,125	332,356.71	$664,713.42

VI. Understandings of the parties at the time of the September 1991 Judgment

None of the people involved in actual negotiation of the Consent Judgment are around today who remember them. But there is some evidence of the understandings.

A. Tom Irwin

As noted above, in 1991 Judge Pajtas took note of the existing development and reclamation plan, and Irwin "established" that the revised plan would not extend the mining in terms of the time for extraction.[60] "Established" connotes that no one had any misunderstanding about this.

B. Steven Tresidder

58 Video 3 starting at 20:43; video 6 starting at 2:14 :28.
59 Thanks to Christopher Mills for analyzing Hearing Exhibit 18.
60 Hearing Exhibit 14.

In February 1989 H&D's then-Counsel Steven Tresidder told Intervenors' then-Counsel Barry Levine that "the 25 year period of operation is longer than H&D expects to utilize the site."[61] In effect, Tresidder was shortening Irwin's projection.

C. The Township

As noted, the Township says it doesn't believe a 71-year life span for this operation was contemplated by anyone in 1989.[62] Again, no misunderstanding.

D. Ethan Belden

Belden admitted the strength of the economy is not necessarily a predictor or indicator of demand. He testified:[63]

> A Even in a strong economy, if the demand is for a particular product, that reserve may not be able to meet the demands to produce that product. Therefore even in a strong economy sometimes it's the other way.

He added:[64]

> Q And you heard testimony earlier today that there is nothing in the Consent Judgment that says the Company has the right to mine until it runs out or until it's depleted or until it's exhausted. No wording in the Consent Judgment to that effect, is there?
>
> A I read it that it was understood that when the material was gone was the basis of time.
>
> Q I'm asking for wording in the Consent Judgment that states your understanding.
>
> A Could you ask the main question again, then?

61 Video 5 starting at 19:06.
62 Hearing Exhibit 10.
63 Video 6 starting at 1:58:02.
64 Video 6 starting at 2:16:00.

Q Yes. Is there wording – You just stated your understanding that they could mine, the Company could mine until the material runs out. And I'm asking you to point to me wording in the Consent Judgment that states your understanding.

A Oh sure.

[looks for and receives a copy of the Consent Judgment]

A So I can, I mean – Through my profession I look at a lot of these things, and that is what occurs to me such as Article, or Paragraph 11 "reflects the goals of the parties in attempting to both mine and restore the subject lands." To me when I read "mine" - "remove, extract, gone."

Q But someone who is not in the mining industry such as these Intervenors, 35 Intervenors at the time – now we're down to 3 or 4 – would not have that understanding, would they?

A I can't answer that. I don't know.

. . .

Q So, have you found specific wording stating that the Company is allowed to mine till the material runs out, or until it is depleted, or until it is exhausted? Mr. Pemberton already answered no, he could not find it. Then I'm asking now can you find it ?

A Well, you know, just for definition's sake "exhausted" is in ¶ 18, which refers to when H&D shall grade the land owned. So –

Q By Emmet County?

A Yeah. It's clear to me that those that put this Consent Judgment together clearly understood the meaning of "exhausted."

Q Well I grant you that in regard to the Emmet County property, ¶ 18 does refer to "exhaustion." But that's only talking about Emmet County property. And there is nothing about exhaustion regarding H&D property or Rieth-Riley property, would you agree with that?

A Yes.

So he was talking about Company understandings. But he knew nothing about the understandings of the Intervenors.

He even cast doubt on his own assertion that the endpoint of mining is determined by exhaustion of the material:

> Q So the grading plan might have, and you're just not sure, might have prevented the company from exhausting everything?
>
> A I mean, it could have. I'm not familiar with this [tapping the Consent Judgment].[65]

Belden was testifying only about understandings and practices within the industry. But there is nothing in the documentation that these Intervenor-homeowners knew anything about the industry or its practices. Nor is there anything in the 820-page Record (which the Petitioners picked up from the Court before filing this Petition) which indicates their Counsel knew of industry practices.

VII. Ambiguities

A. Equating need and strategy

JoEllen Rudolph testified: "To me, the "advisory" word was not clear, not to a lay person. It's not clear."[66]

As an example, part of this dispute depends on the meaning of "need," a word used in ¶ 11. But for this Company "need" and "strategy" are the same, according to

65 Video 7 starting at 2:54.
66 Video 6 starting at 57:54.

Pemberton:

> Q Now company need is not the same as company strategy; would you agree with me about that?
>
> A No I would not agree.
>
> . . .
>
> Q I'll try to re-phrase it. You said in your affidavit that you made a strategic decision to close down the asphalt plant. Do you recall that?
>
> A That is correct.
>
> Q All right. But that wasn't a decision based on need. It was a decision based on your strategy at the time?
>
> A No it was based on need.
>
> Q So any time you make a strategic decision, that's a need decision?
>
> A Yes, it's a needed.[67]

B. Manipulation of "demand"

Another part of this dispute depends on the meaning of "demand." Traditionally demand is considered something determined by external forces, such as customers and the market. But Rieth-Riley says it also depends in part on something controlled by itself, the pricing.[68]

There is no objective evidence of changes in market demand, the Company admits.[69] Even so it manipulates demand. Thus, its only major competitor in this part of

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67 Video 2 starting at 7:10, 7:50 (emphasis added)
68 Video 1 starting at 1:43:05; video 6 starting at 2:15:40.
69 Video 1 starting at 1:42:31.

Charlevoix County is Team Elmer's which the Court may note[70] has a pit just 15 miles away in Boyne City.[71] Even so, according to Pemberton, the two don't bid against each other. They are "sister" companies:

> Q Is there any way in which Rieth-Riley and Elmer's are sister companies?
>
> A I don't understand. They are an independent company; they have their own gravel pits; they have their own resources, their own crews. As does Rieth-Riley.
>
> Q And you are still a competitor of each other?
>
> A Yes.
>
> Q You might bid against each other for the same job?
>
> A We are not bidding against each other at this point in time.[72]

As every first-year economics student knows, a non-competition practice will naturally drive up prices.

Asked whether an expected increase in demand had prompted the decision to mine a huge amount the second time in 2023 – despite having previously declared that the "best cost" was to mine only every 3-4 years[73] – Pemberton could cite no new customers or new contracts.[74]

What might have justified such a big increase? Pemberton "hoped" market

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70 MRE Rule 201(b).
71 *https://www.chamberofcommerce.com/business-directory/michigan/boyne-city/aggregate-supplier/2016195753-team-elmer-s*
72 Video 2 starting at 4:12.
73 Video 1 starting at 27:08.
74 Video 1 starting at 1:42:31.

demand in the coming year would remain the same as it has been ("fairly good").[75] But mere "hope" is not a scientific projection. There had been no change in specifications.[76]

Stockpiling is a red herring in this case. Company expert Belden testified that stockpiled gravel deteriorates over time, sometimes even in just one year.[77] But the Company ignores the advice of its own expert, and stockpiles for periods of 3-4 years,[78] and sometimes much longer.[79]

Looking at the anticipated profits it stacked up in 2023, the only explanation Petitioners can see for the big increase of extraction that year was not demand or need. It was strategy arising, we speculate, from Company fear the Court would rule it had to stop.

C. The Schedules / Gantt Charts

Some of this controversy revolves around the "Schedule" or the visualizing Gantt Charts seen in each of the Judgments. The Charts are labeled "Exhibit D" in the two Judgments of 1991[80] and the one in 2004.[81]

"A picture is worth a thousand words," as everyone knows. And a picture, accompanied by few words and a caption, is just what a Gantt Chart is. Such a picture is emphatic and memorable, unlike a thousand words.

75 Video 2 starting at 6:17.
76 Video 2 starting at 1:10.
77 Video 7 starting at 9:41.
78 Video 1 starting at 27:08.
79 Video 3 starting at 45:23.
80 Hearing Exhibits 3 and 4.
81 Hearing Exhibit 5.

The September 1991 Judgment is the one at issue in this case.

As can be seen from Paragraph 11, it is only Exhibit D, the Schedule, which was said to be "advisory." The parties' "goal" of restoring, on the other hand, was unqualified and absolute. Pemberton was asked twice if he agreed with that; at first he disagreed, but finally said he couldn't answer.[82]

The identity of just who "projected" the Schedule of Exhibit D was an issue at the hearings. But Paragraph 11 identified the "projector" as H&D: We know Company CEO Irwin was involved in creating it.[83]

Anyone else? No: As to Township officials, testimony established without objection that none of them "knew" to construct a Gantt Chart, or was an "expert on mining."[84] As to Bauer, his letterheads[85] identify him only as a planner and architect, not a miner. As to Petitioners, they had no expertise[86] and they hired no experts. They were not parties anyway in 1988 when the 25-year projection was first stated.

That leaves only experts and officials of H&D, people like Irwin and Belden, who had the ability[87] and equipment, to undertake a scientific projection.

Belden testified that townships frequently ask him to give a timeframe for a mine and he always answers the time is based on demand, giving a number and emphasizing it

82 Video 2 starting at 8:44, 11:25.
83 Video 1 starting at 1:31:30.
84 Video 3 starting at 1:46:16.
85 Hearing Exhibits 8, 20.
86 Video 6 starting at 9:38.
87 Hearing Exhibit 21.

is only an estimate, hypothetical, and advisory.[88]

But unlike in Belden's townships (according to Judge Pajtas) timing of this contract development was "agreed to."

He was asked if he had ever been off by 25 years in a 40-year old pit. He couldn't answer with a yes or no:

> Q Have you ever projected the life of a mine in a 40-year-old pit?
>
> A I've estimated the volume of a mine in a 40-year-old pit.
>
> Q And have you ever been off by 25 years?
>
> A We'll see. We'll see. I've tested properties that are likely to be who knows how old that are in operation today. I couldn't answer that question until they're depleted."[89]

If the Court accepts that H&D drafted Paragraph 11, then it must construe any ambiguities against Rieth-Riley today.[90]

Note the vertical lines at the beginning and end of each bar in the September 1991 Schedule – Exhibit D – except at the beginning of Phase V where instead we see dots.

Exhibit D is self-evidently a Gantt Chart. Christopher Mills and Jim Rudolph have lifelong business backgrounds in constructing and interpreting such Charts. Rudolph even made one himself for the Court, to visualize Rieth-Riley's mis-conception of the 1991 Consent Judgment.[91] Both of them testified to the customary meaning of the

88 Video 6 starting at 2:03:38.
89 Video 6 starting at 2:11:29.
90 M Civ JI 142.57 "Interpretation Against the Drafter," citing *Klapp v United Insurance Group Agency*, 468 Mich 459 (2003),
91 Hearing Exhibit 7, Attachment 3.

vertical lines on the ends of the bars of Exhibit D – marks that were absent from the previous schedules: the vertical lines emphasize the start and end of each phase.[92]

Rudolph took particular note of the contrast between the vertical lines on the ends of all the bars except for the dots at the start of Phase V.[93]

Mills explained succinctly about the vertical lines:

Q Do you know what a Gantt graph is?

A Yes.

Q And do you work with them?

A Yes.

Q Ok are you looking at a Gantt graph here on the easel [Exhibit D]?

A Yes.

Q And do you see vertical lines at the ends of the horizontal bars?

A Yes.

Q And being a customary user of Gantt graphs, do those vertical lines at the beginning and end of each bar signify anything to you?

A To me it's the start and end of that part of whatever project.[94]

See also McMahon's testimony:

A I do understand that when you look at a project or a Gantt Chart or a timeline, it's describing tasks that are to be completed. And it gives a start and an end.[95]

92 The Rudolph visualization chart is Attachment 3.
93 Video 1 starting at 1:05:05.
94 Video 4 starting at 11:27
95 Video 4 starting at 29:35.

D. "Sole discretion"

Unlike Paragraph 10 and Exhibit B of the Consent Judgment, which give the Company "sole discretion" over exercise of "optional approaches" to mining and restoring, Paragraph 11 does not use the phrases "sole discretion" or "optional approaches." Nor even does it use the words "estimate" or "hypothetical." It does use the terms "demand" and "need," but Rieth-Riley did not try to carry its burden to show "demand" or " need" has changed over the years.

Particularly during the "crazy" mining in the fall of 2023, there was no demonstration of increased demand or need.

Even while acknowledging all this, Pemberton still asserted it was within the Company's "sole discretion" to alter the schedule of Exhibit D.[96]

Phase V had an option to extend its period at the front end. Phase VII is just the opposite: it has no option to extend its period at the back end.

VIII. Other aspects of the Consent Judgment

A. Rieth-Riley use of Townline and PinCherry Roads for hauling gravel

Three witnesses testified about ingress and egress of Rieth-Riley trucks (or trucks contracted by Rieth-Riley) for hauling.

During the summer Mills saw 20 or more hauling trucks, which he could identify because of the tarp bars on top, on Townline Road where hauling is prohibited.[97]

96 Video 1 starting at 1:31:59.
97 Video 4 starting at 1:50.

Kozma and Jeff Harmon chanced to meet this fall at the entrance to Phase VII. A gravel-hauling truck approached from the East on PinCherry. Kozma flagged down the truck and spoke with the driver. Harmon could only hear one side of the conversation. But Kozma remembered it all. It started with her saying:

> "'Hey, hi, do you know that you're not supposed to be on PinCherry Road and Townline Road?' And he said something like 'No I didn't.' And I said 'Yeah, there's a Court agreement about it, you should check into it.'"[98]

The driver entered the Pit at Phase VII, got his load and left, tarping up by pushing a button in the cab as he did so. Exiting, he did so properly without using prohibited PinCherry Road.

The Company adduced no testimony that it had reminded or reprimanded the haulage drivers for having used PinCherry and Townline Roads.

B. Fencing/berms

The Company had orange plastic fencing along the ridge of Phase VII, but not till after Petitioners' November 1 depositions.[99]

Pemberton admitted that the Pit does not have woven wire farm fence at the high walls of the pit,[100] though the Judgment requires at least that.[101]

He insisted on referring to fencing as "safety fencing,"[102] not "snow fencing"

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98 Video 1 starting at 30:16; video 3 starting at 52:30.
99 Video 3 starting at 48:56; 1:08:55; 1:28:20.
100 Video 2 starting at 32:20.
101 Hearing Exhibit 4 ¶ 13.
102 Video 2 starting at 33:28; video 6 starting at 37:30.

which the 1988 Consent Judgment[103] had originally allowed. Company Counsel even asked JoEllen Rudolph "Do you know the difference between safety fence and snow fence?"[104]

But the Company never put on evidence showing a supposed difference between "safety" fencing and "snow" fencing. All it claimed was that orange plastic, being more visible, was "key"[105] and supposedly superior to woven wire farm fencing, despite the abandonment of plastic after 1988.

More to the point, visible plastic is not superior. Petitioner Kathy Martinchek testified that after her November 1 deposition, as she was photographing at the border between her property and the Pit, Rieth-Riley had left the plastic fence lying flat on the ground. In fact she stood on it as she snapped pictures.

> The next two pictures, I am <u>standing on the snow fence that is lying</u> on these berms.[106]

This hardly complies with ¶ 13 of the Judgment which says the fencing is to "guard against persons unfamiliar with the site from falling over the working face."

Even more compelling is a page of a presentation on the MSHA website,[107] Attachment 4, which displays an example of "Plastic Construction Fencing" with a thumbs-down icon next to it. The example is identical to Rieth-Riley fencing, seen in

103 Hearing Exhibit 1.
104 Video 6 starting at 37:30.
105 Video 1 starting at 34:50.
106 Video 3 starting at 1:31:38 (emphasis added).
107 *https://www.msha.gov/sites/default/files/EquipmentGuardingConveyorBelts2010.pdf*, page 33 of presentation (Attachment 4).

Hearing Exhibit 19 with Jim Rudolph standing in front.[108] Pemberton described it as "orange safety fence."[109] But, as viewable by clicking or hovering over an icon at the upper left of the MSHA page, the Presenter declares:

> Plastic construction-type fencing weathers poorly, deflects and cuts easily. It is not substantial or durable and is not acceptable for guarding, even if stretched over a rigid frame.[110]

Though the MSHA presentation is about guarding conveyor belts not perimeters at mines, the Agency observation about weathering, deflection, cutting, non-substantiality, and non-durability ring true against Rieth-Riley's claim that its "safety" fencing is superior to wire.

What the Company did have, even before November 1, were 4-foot-minimum berms which Pemberton insisted "meets or exceeds MSHA standards."[111] He added:

> A The berm in itself meets and exceeds the wire mesh fence; that's the standard by the federal government for preventing not only persons unfamiliar with a open mining phase but also mining equipment.
>
> . . .
>
> A safety fence is kind of what I call a belt-and-suspenders approach; it's a – the berm in itself is sufficient but let's go ahead and add this fence.[112]

He added:

> Q What does a berm do with respect to something like a snowmobile?

---

108 Hearing Exhibit 19 is a series of 6 photos. The first two are Attachments 5 and 6.
109 Video 6 starting at 1:12:08.
110 Emphasis added.
111 Video 2 starting at 32:20.
112 Video 6 starting at 1:12:50 (emphasis added).

A I don't see how it could get up, up over these berms. I mean it would be very difficult."[113]

His testimony caused a stir in the audience. What he said is not so. The Court may note[114] that hill climbing by 4-wheelers is a publicly recognized sport,[115] including in Michigan.[116] They can go right up hills nearly as high as the ridge at Phase VII, as numerous thrilling YouTube videos attest.[117] So can snowmobiles.[118]

Janet Simon grew up and lives in Bay Shore and worked at the Bay Shore food market for 25 years. She elaborated Mills's concern about dangers, described below. Twelve years ago after Rieth-Riley had acquired H&D's interests, her son at age 12 trespassed in the Pit and rolled over in a 4-wheeler. "It was easy to get in there," she explained. At the hospital the boy's leg needed over 30 stitches.[119]

Later around 2019, Simon got a call from Rieth-Riley employee Ben Deschermeier. He said there was a red truck hanging over the edge, and to find out who it is and get it out of there. Later she found out what happened and talked with the kid, whom she had known since he was 8. It was a suicide attempt. He didn't plunge all the way to the bottom but Simon testified the berm at the top had nothing to do with that. There was no fencing. He had entered the old PinCherry Road from Townline Road and

113 Video 2 starting at 33:05.
114 MRE Rule 201(b).
115 "Hillclimbing", *https://en.wikipedia.org/wiki/Hillclimbing*
116 *https://www.summitpost.org/michigan-county-highpoints/369617*
117 See *https://www.youtube.com/watch?v=MDjN34gz9fc* or *https://www.youtube.com/watch?v=hy8nwAOSFKQ&t=331s* .
118 See *https://www.youtube.com/watch?v=rq4-XSRHy44*
119 Video 3 starting at 2:15:20; 2:32:25.

driven off the end of the cliff.[120]

Simon placed the incident in 2019, which was before Phase VII was mined:

> Well it was hanging over the edge of the Pit. Phase VII. And that was before they mined and made it even steeper than it is now.[121]

So Pemberton, claimed by the Company to be "aware of the regulations that govern mining and open mining pits,"[122] was imagining when he testified as he did[123] that the Company "meets and exceeds" federal berm regulations. As documented at the beginning of this Brief, there are none.

Equally, Rieth-Riley Counsel was wrong to assert Pemberton had:

> testified that under the standards of both the state and federal regulatory agencies which govern this mine berms are considered more than, not at least [in compliance with the Consent Judgment].[124]

The Company is over 100 years old, and Pemberton has worked in gravel 27 years.[125] They should have known better. Retained Company Counsel may not know mining law, but assuredly in-house Company co-Counsel does. Pemberton's testimony should not have been allowed.

The Pit is an attractive nuisance. Whether an actionable tort for a neighbor might lie in some future case is beyond the scope of this case. What is before the Court is whether mining and failure of fencing should have already ended, or whether Petitioners

120 Video 3 starting at 2:16:10, 2:13:14.
121 Video 3 starting at 2:18:19.
122 Video 6 starting at 1:12:50.
123 Video 2 starting at 32;:20; video 6 starting at 1:12:50.
124 Video 6 starting at 15:14.
125 Video 2 starting at 26:57, 48:22; video 3 starting at 45:34.

have to wait till after they are dead.

C. Vibrations

Marolyn Anderson has lived at 10596 PinCherry Road since 1984. She is an adjacent neighbor to the Pit but not an Intervenor. Her lot is on the ridge overlooking Phase VII. She testified:

> Yeah when they first started digging out the Green Pit [in 2023], I had very strong vibrations. And I have a weak wall on the east side of my basement. And I – That worries me. 'Cause I was on a ladder trying to do some repair on the house. And I could feel it on my ladder up there. And I walked up there to see what was going on. And they was pushing brush out of the way I guess.[126]
>
> . . .
>
> I could add, I still have vibrations going on [Judge interjects and repeats her statement] but not as bad.[127]

As to vibrations state and federal regulations – and derivatively the Township Ordinance – say nothing. The same as fencing.

Not being an Intervenor this Court cannot remedy Anderson's situation. Damage to her foundation has not and may not ever appear. Some day it might. But even if it doesn't her home is her castle. Fear that her walls might come down would be compensable if she chose to pursue it.

IX. Argument

A. Introduction

As noted by Judge Pajtas, this is a contract case not an Ordinance case. Unlike in

126 Video 3 starting at 1:05:28 (emphasis added).
127 Video 3 starting at 1:08:32.

an Ordinance case, where "very serious consequences" would have been relevant to interpretation,[128] the Consent Judgment today is to be interpreted in the same way as an ordinary business contract.[129] Rieth-Riley cannot change the terms or time frame of the Consent Judgment. Nor even can the Court, without consent of every party, as Judge Pajtas recognized. However, a Court can interpret ambiguous terms of a consent judgment.[130]

B. Petitioners' theories

As noted, Petitioners' principal theories relate to the mine's agreed-to time for extraction and reclamation. Other issues emerged during the depositions and are before the Court,[131] violations of the overlap requirement, Townline/PinCherry prohibition, and fencing requirements. Accordingly the Petition is amended to conform to that evidence.[132]

In colloquy at both hearings, the Court was puzzled about Petitioners' lifespan theories.[133] Petitioners sought to explain in response, there were two originally.

1. Theory 1

Theory 1 will be elaborated at greater length below. In sum, Rieth-Riley is bound to 25 years by the wording and history of the Consent Judgment. Exceeding 25 years

128 MCL 125.3205(3)-(5).
129 *Hein v Hein*, 337 Mich App 109 (2021).
130 *Andrusz v Andrusz*, 320 Mich App 445, 453 (2017); *Sauer v Rhoades*, 338 Mich 679 (1954).
131 Video 1 starting at 9:41.
132 MCR 2.118(C).
133 Video 1 starting at 3:22;video 3 starting at 28:54; video 7 starting at 5:18.

was not one of the available "options" listed in Exhibit B. Relevant are ¶ 15(b) of the 1989 Judgment which required any later revision to be consistent with the 1989 exhibits of which one was the 25-year Gantt Chart, the Company's 1991 testimony that there is a time for extraction and it would not be extended, Judge Pajtas's holding that the timing of the development was "agreed to," and the ¶ 11 wording based on H&D's projection and saying "deceleration" – mere slowing down of the pace – would be allowable only if the Company carried the burden empirically to prove changes in demand or need.

2. Theory 2.

Theory 2 (if the Court rejects Theory 1) is supported by the Model Jury Instructions and several Court of Appeals decisions.[134] They say when there is no time limit specified in a contract then the Court is to read into it a "reasonable" period.

Petitioners argue under Theory 2 that a reasonable period should be 25 years since the Company projected that five different times, and H&D's Tresidder effectively projected it would probably be even less.

The Company for its part contends a reasonable period would be:

Q (a) when the material is gone, and (b) there is no longer any demand for it.

A That's correct.

Q And that's why contracts are advisory only.

134 M Civ JI 142.21 "Time of Performance"; *McCune v Grimaldi Buick-Opel Inc*, 45 Mich App 472 (1973); *Walter Toebe & Co v Michigan Dep't of Highways*, 144 Mich App 21, 30 (1985); *E C Nolan Co v Michigan*, 58 Mich App 294, 303-05 (1975).

A Right, and then also there is a third component, which is our needs.

Q The needs of the Company?

A The needs of the Company, absolutely.[135]

Stated otherwise, the Company contends that the Consent Judgment has no end date, that the 25-year period of the Schedule – and the 5-year period of Phase VII – are to be ignored whenever the Company or the market "needs" gravel, and that therefore the only reasonable date the Court could set would be when the gravel is depleted and exhausted.

The Company position might have been tenable if the Intervenors were a mining company, or an entity with knowledge of the workings and traditions of the industry. But they were ordinary homeowners with no clue that Belden and others in the industry may think that depletion and exhaustion determine the life of a mine. Like Judge Pajtas himself, they had a right to rely on the deserved good faith of Irwin and Tresidder. They were the ones who actually made the agreement. True, Intervenors' law firm had well-experienced environmental lawyers, but there is no evidence they were experienced in the specialty field of gravel mining.

The Court has no middle ground. Even so, the Company suggests it could be willing "in all fairness" to limit the time period to a period for Phase VII of 5 more years from today.[136]

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135 Video 2 starting at 59:01.
136 Video 2 starting at 41:31.

But the Court could only opt for a shorter period today if there were wording in the Judgment pointing to that number. There is none, nor would such an extension be an "optional approach" allowed in Exhibit B. The Company has been in Phase VII since 2012, it says, for a total of 12 years to date. This is more than twice the number – 5 years, as Pemberton admitted[137] – which H&D projected in 1991.

During its time of mining H&D stayed within the limits. "Reasonableness" requires Rieth-Riley to do the same today.

Straight across the street from the Pit is a playground, Simon noted.[138] Responding to the idea of 5 more years (or even 1 more year), nearby resident Mills, who heard Pemberton's prediction of 36 more years at the Township,[139] explained why that would be unsatisfactory. He lives in a residential neighborhood at the corner of Townline and Petoskey Streets. From his second floor he can see Rieth-Riley operations including trucks going in and out at Phase VII.[140] He explained:

> if they were going to do 36 years to mine out the rest of it and shrinking that down to 5 years or 1 year, it makes me feel or assume that they would be more aggressive in their mining tactics, because they would want to get everything out that they wanted to, and that concerns me greatly. As far as like increased noise, increased traffic, and increased hazards. I have a 1-year-old, so risks to my child and other people's children.[141]

Finally "fairness" – not just for these Petitioners but for the Community – is

137 Video 3 starting at 26:02.
138 Video 3 starting at 2:30:19.
139 Video 4 starting at 6:59.
140 Video 4 starting at 1:29.
141 Video 4 starting at 7:13.

hardly this company's watchword:

- Pemberton told a packed Township meeting the Company would mine only every 3-4 years, but then it reneged, coming back for a second time in 2023.
- The Company has been untruthful about federal and state mining regulations.
- The Company said falsely it would put on a witness to testify one of the Intervenors was a Township Board member.
- Rieth-Riley and Elmer's together manipulate "demand."
- The company equates "strategy" and "need,"
- It stockpiles gravel for years at a time, even while asserting stockpiling degrades the gravel.

This Company has made more profit – over a half-million dollars more – than it ever dreamed of when it acquired the Pit in 2005. "Fair" is fair. The time has come for reclamation.

3. Theory 3

Petitioners now propose Theory 3, occasioned by the Company's citation at the start of the November hearing[142] to *Lichnovsky v Ziebart International Corp*[143] Counsel correctly noted that "parties can enter into a contract for an indefinite period of time." *Lichnovsky,* he continued:

> begins to flesh out what is the law in practically <u>every state</u> of the Union at this point, that <u>if</u> the parties enter into an indefinite agreement <u>and</u> there is a way of <u>calculating</u> an end date for that agreement then the Court will not substitute its judgment for the judgment of the parties. And we maintain in this case there is an <u>absolute</u> way to <u>determine the end date</u>. And we expect to present testimony on that.[144]

142 Video 1 starting at 4:50.
143 414 Mich 228 (1982).
144 Video 1 starting at 5:38 (emphasis added).

But the Company never showed a way to "calculate" an end date in this case. Particularly an end date is not pegged to the date when the gravel may be exhausted, because demand is an important factor – perhaps even the determining factor – and as Pemberton insisted it cannot be calculated. Which means the date of exhaustion cannot be calculated.

Belden, its expert, testified in sum as recounted above:

(1) As a professional in mining, regarding the word "mining" in Paragraph 11 he said: "To me when I read 'mine' - 'remove, extract, gone.'" But when asked if people like the Petitioners who were not in the industry would have a different understanding he didn't know.

(2) He wasn't sure if the Consent Judgment really did intend that the Company would exhaust everything, given the existence of the Final Grading Plan. (Petitioners have located a legible copy of the September 1991 "Final Grading Plan," and move to substitute it for the "Final Grading Plan" as seen in Exhibit C of Hearing Exhibit 4.[145])

(3) He asserted that the drafters of the Judgment "clearly understood" the meaning of "exhausted." But when it was noted to him that ¶ 18 of the Judgment referred to "exhaustion" only of Emmet County lands, while ¶ 11 did not refer to "exhaustion" of H&D's lands, he could not explain why that word was absent.

(4) Exhaustion has little to do with the issue anyway. Belden admitted that even in a strong economy there might not be demand for a mine.

145 Attachment 7.

So a date for such a decision cannot be "calculated" in any "absolute way." And, according to *Lichnovsky*:

> Agreements containing no such provision [concerning the term or duration of an agency, employment, or license agreement] are often characterized as being for an "indefinite term." The rule of construction is that such an agreement is terminable at the will of either party.[146]

Lichnovsky cited and relied on a 1932 case, *O'Connor v Hayes Body Corp*,[147] which similarly held:

> The contract of employment, being for no definite period, was a hiring at will and could have been terminated, at any time, by either party without notice.

So if the Court holds the Company is correct that there is no time limitation to mining the Green Pit and that unpredictable "demand" determines when mining will stop, there is no way to "calculate" what would be an end date for the Judgment.

Accordingly, Intervenors can terminate the consent Judgment, a contract, at will.

They did so by filing the present Petition on April 17, seeking a TRO and injunction ordering an immediate end of mining.[148] Terminating would put the parties back to where they were when H&D sued. That was in 1987.

Theory 3 only kicks in, however, if the Court holds that the September 1991 Consent Judgment did not limit mining to 25 years.

Every clause in a contract – especially one crafted by lawyers – has to be read as having purpose and meaning. Exhibit D must be read as having meaning. Otherwise it

146 414 Mich at 738-39 (emphasis added).
147 258 Mich 280, 282 (1932).
148 Petition ¶ 35(c).

would have served no purpose.

Undoubtedly aware of the harsh principle of *Lichnovsky* and *O'Connor*, the negotiating lawyers were able to avoid at-will termination by including Exhibit D, the 25-year lifespan, as a driving part of the Judgment. That was the purpose of including it.

That in turn enables Theory 1.

C. Elaboration of Petitioners' Theory 1

1. Violation of the 25-year limit

Judge Pajtas's evaluation of Irwin's testimony, and his acknowledgment of the "timing of the development as agreed to"[149] bind this Court today.

"Development" is a broad word, referring to all lands in the Green Pit, not merely the three added in 1991. As Rudolph's survey disclosed, a top Community priority was that H&D would close the gravel pit and stop mining in 10 years, and proceed to reclamation. Trying to address the timing concern is what brought Tresidder to say what he said.

As laid out more fully in the bullet points below:

Judge Patjas did not consider that the words "advisory," "need," and "demand" canceled out the 25-year schedules in five different Judgments, as Rieth-Riley contends today (but H&D never did).

The "advisory" language does not mean the Company has unquestionable control

149 Hearing Exhibit 14.

of Schedule. H&D knew the difference between "advisory" and "sole discretion," terms that Rieth-Riley today treats as synonyms.

As seen in the extension of Phase V in September 1991, acceleration and deceleration are not the same as extension. The dictionary definition of “advisory” means the Company does not have control or decision-making power, but rather only the ability to advise, suggest, or recommend.

The 25-year projection advised by H&D was accepted by the parties and the Court. This was established as an obligation the Company had to uphold, which Judge Pajtas acknowledged in finding that the timing was “agreed to.”

Paragraph 11 acknowledges the Schedule was projected by H&D, but it does not say that accelerating or decelerating can update the projection, or have the effect of extending the end time. The Judge also held the burden would be on the Company to show demand or need had changed over the years, something the Company did not even attempt to show at the hearing.

Acceleration and deceleration refer only to pace and speed based on demonstrated “demand” and “need,” but only within the agreed-to, established parameters of the “existing plan” which could not be inconsistent with the negotiated parameters in 1989.

The carefully-drawn schedules, consistent with details in each iteration, were not written to mislead the Township and Intervenors. Rather they illustrated the "goals" of the parties to mine and restore in the Intervenor's lifetimes.

No evidence or corroboration is needed. Even so, the above evidence supports:

- The Township does not believe that such a long life span was contemplated by anyone in 1989.[150]

- As related above, the parties would have wanted to avoid the near-universal doctrine, according to which the Intervenors could have terminated the Consent Judgment at will if the contract had no calculable end-date.

- Knowing the Company's 25-year projection, and that it was made in good faith, Judge Pajtas would not have allowed a revised Schedule which allowed mining to go to a year when everyone was dead.

- Under ¶ 10 of the September 1991 Judgment, the company has "sole discretion" only over "optional approaches to mining the site, which are identified in" Exhibit B, and none of these options relates to the time for extraction. "Optional" language does not apply to Exhibit D (the Schedule).

- Under ¶ 15(b) of the 1989 Judgment, the "revised Schedule of Mining" in 1991 "shall" be "consistent with the . . . phase progressions and other details of the exhibits as presently prepared . . . ." One of the "exhibits" was the 1989 Gantt Chart. Consistency with exhibit details, and non-extension of the agreed time of mining, were conditions which the Court imposed on the Company when lands were added in 1991. The Company cannot renege now.

- Exhibit D is not the only Judgment language which supports the 25-year requirement. The bond language and Exhibit B do too, and they are neither "advisory" nor "optional approaches." They also require overlapping of all Phases, language which the Company violated by the gap of 3 to 10 years between Phases VI and VII,[151] (as noted in the next section).

- H&D did not rely on the "advisory" language of ¶ 11 when in September 1991 it sought to extend the potential start of Phase V by many years. Instead it recognized that Exhibit B did not allow extending Phase V, and therefore it could only revise Exhibit B by consent. The extension is indicated not just by the dotted line on the Schedule, but by ¶ 1 of the Judgment (quoted above).[152]

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150 Hearing Exhibit 10 (emphasis added).
151 Video 3 starting at 2:18:24.
152 Hearing Exhibit 4, "Mining and Reclamation Plan," Phase V, Point 3.

Since the Company needed a new Judgment in 1991 to extend Phase V, it needs or wants a new Judgment now – indeed it should have sought one in Year 26 – for Phase VII. This it cannot have without everyone's consent.

- According to any English dictionary, "decelerating" means slowing down of speed. Slowing down is distinct from coming to a full stop for 3 years or more, from extending the period, and from "optional approaches to mining the site." Nor does it mean extending the end time of a Phase. Had the Company started Phase VII right away in 2009 when Phase VI was done, at the rate the Company demonstrated in 2023 – "mining like crazy" despite having no new pending contracts or customers – the entire Green Pit would have been completed and restored within the 25 years.

- The Company's anti-competitive practice with Elmer's manipulates demand and prices, something surely at odds with ¶ 11.

- The Company equates need and strategy. Again this is at odds with ¶ 11.

- "Sole discretion" is spelled out in ¶ 10, but not ¶ 11.

- In terms, the Judgment considered Emmet County's pit was completed when it was "exhausted," but the Judgment has no such terms for this Company's Green Pit.

- Tresidder told the Intervenors in 1989 while the Consent Judgment was in negotiation, "the 25 year period of operation is longer than H&D expects to utilize the site." It was in effect, a new "projection." Intervenors were entitled to rely on it.

- As noted above, ambiguities are to be construed against the drafter.

The 25-year issue issue is driven home most emphatically and visually by Hearing Exhibit 7, Jim Rudolph's home-made Gantt Chart visualizing the Company's position.[153]

A violation must be found on this basis alone.

153 Attachment 3.

2. Violation of the overlapping requirement

The gap of several years between Phases VI and VII was another important violation, involving overlapping. As noted above, Pemberton acknowledged Phase VI was mined, completed, and reclaimed before PinCherry was moved in 2009. According to Simon, as also noted above, mining in Phase VII did not begin till after 2019.[154]

Exactly what year Phase VII mining began, the Record does not say. It was some time before September 2022 according to the Bauer report that month, which identified Phase VII as an "active mine area."[155] The truck tickets of Exhibit 18 don't help to clarify, because they don't identify the Phase of origin of the gravel. Also many tickets for 2019 refer to "Prison Run," a location unknown to this Record. Pemberton himself did not identify the tickets' Phase of origin.

If the ticketed runs in 2012 actually were of gravel from Phase VII, that would mean there was an unexplained 3-year gap between VI and VII. If it was from somewhere else the gap was even longer.

There were no Bauer reports between 2009 and 2022. So they too do not identify the Phase of origin of gravel in the years following 2009.

The bottom line is there was a gap of 3 to 10 years between the mining of Phases VI and VII.

But the bond language, Exhibit B, and the Schedule require overlapping of every

154 Video 3 starting at 2:18:24.
155 Hearing Exhibit 8.

Phase with the one before and the one after (with some differences as to Phase V). Overlapping is mandatory, not "optional."

Gravel coming from the wrong phase would have been out of order, prohibited by Paragraph 1, quoted above. The burden being on the Company, it had to "show[] after a due process hearing, that the proposed expansion is harmonious and comports with the existing mining plan," including the overlapping of Phases VI and VII.

Elimination of the gap by moving straight to Phase VII after Phase VI, and elimination of subsequent intermittent full stops unmotivated by demand or need, would have brought the Company safely within 25 years. The Company has adduced no evidence that demand, need, or strategy drove its decision to sit around for that time.

The Company has no way to avoid this violation.

3. Townline/PinCherry Roads and Fencing/Berms

Haulage drivers regularly access Townline and PinCherry Roads, and don't even know it's a violation. The Company has not reprimanded them.

4. Fencing / Berms

The Company has been untruthful about the governing laws and regulations of fencing and berms, and its representation of berms' protective abilities, as seen by the widely available videos above.

D. Laches

Petitioners filed the Petition on April 17. The Company has defended by arguing

laches, contending it had mined in the years 2012, 2015, and 2019 – after the 25 years had ended – without complaint from the Intervenors.

Asked to explain why the Intervenors took no action at the end of 25 years, as related above Rudolph explained that but little mining was going on at the time, and the legal fees would have been high.

Besides, as seen above the Company profited by $664,713.42 from the Intervenors' inaction. There was no prejudice, an essential element of a laches defense, as the Court of Appeals noted quoting from an earlier precedent:

> "Laches is an affirmative defense which depends not merely upon the lapse of time but principally on the requisite of intervening circumstances which would render inequitable any grant of relief to the dilatory plaintiff. * * * For one to successfully assert the defense of laches, it must be shown that there was a passage of time combined with some prejudice to the party asserting the defense of laches. * * *" (Citations omitted.)[156]

The Company adduced no evidence whatever of prejudice from delay. Rather, it profited.

Also contrary was the Company threat last summer to adduce witness testimony that "one of the Petitioner-Intervenors served on the Township Board and never raised the issue of Rieth-Riley's continued operations to the Township Board."[157] But no Intervenor except Fisher was ever on the Township board. As to her, her service was within the 25 years of the Judgment schedules. Accordingly, while on the Board she

156 *F Yeager Bridge and Culvert Co, Matter of*, 150 Mich 386 (1986) (emphasis added).

157 Brief In Opposition to Petitioner Intervenors Request for a Temporary Restraining Order, 4-2023, p ___.

ave had no call to complain that mining had continued longer than 25 years.[158]

The intimidating threat of actual testimony was empty, based on false information[159] from some unrevealed person in the Company's service. The source could not have been someone from the Township; Township officials know their own business.

X. Conclusion

Several violations have been shown. Petitioners ask the Court to declare the violations, and enter a preliminary and permanent injunction ordering Rieth-Riley to cease mining and extraction operations at the Green Pit.

Petitioners additionally request orders that:

- the Company begin reclamation when the winter weather clears, and complete it within a year according to the legible Final Grading Plan (Attachment 7),
- require one more inspection and report of the Final Grading Plan by Bauer at Rieth-Riley's expense, and
- the Company comply with such other relief as is equitable.

Respectfully submitted,

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Dated: February 2, 2024

158 Video 6 starting at 31:52; video 3 starting at 1:56:10, 2:09:18.

159 Video 3 starting at 1:56:10, 2;09:18; video 6 starting at 31:52.

Attachment 1 – Corrected

Exhibit D

Hearing Exhibit 4

Consent Judgment September 19, 1991

SCHEDULE OF MINING & RESTORATION

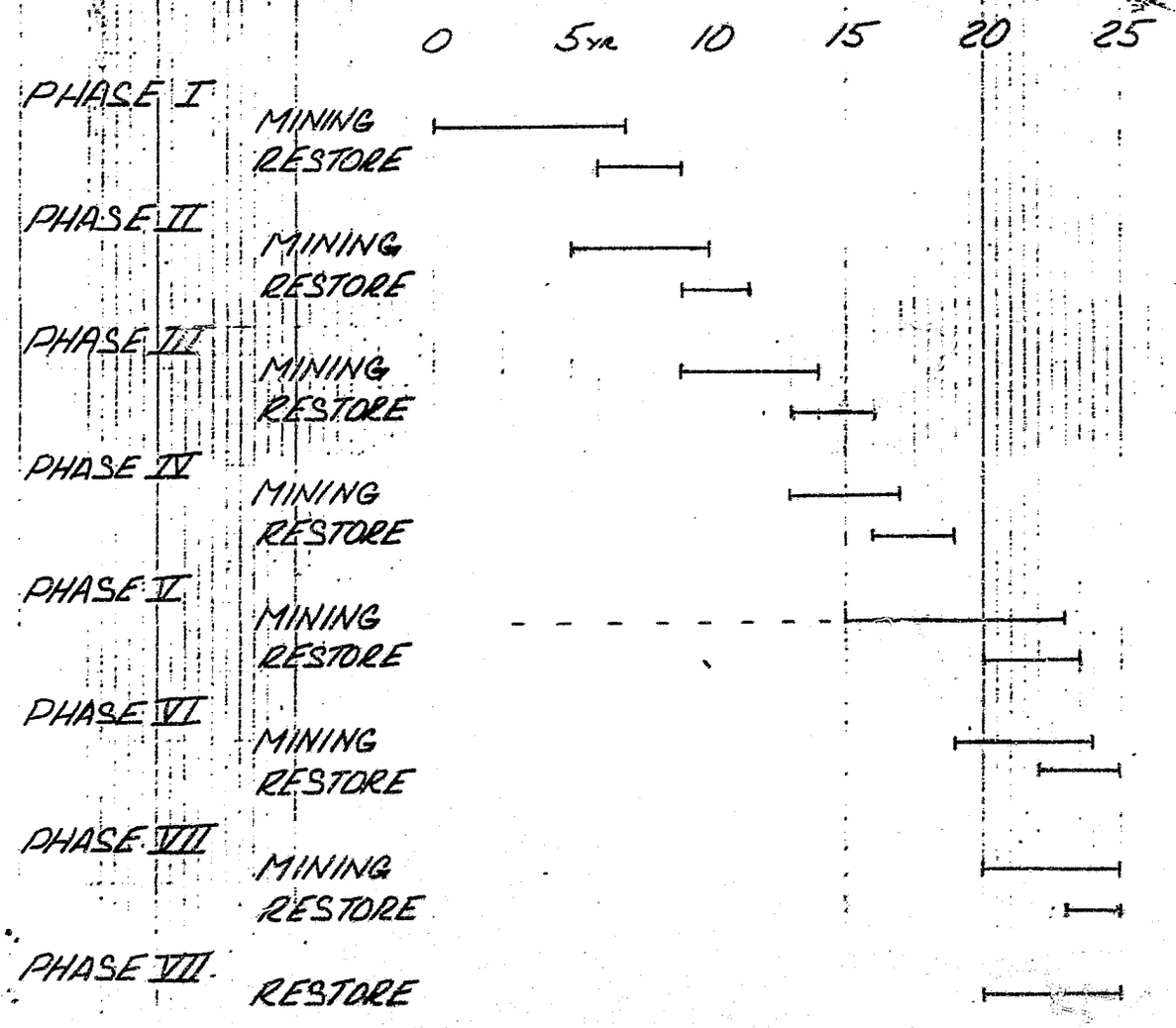


EXHIBIT D

10/91

Attachment 2

Hearing Exhibit 15

Map of Green Pit and Surrounding Property

Intervenors'/Petitioners'

Exhibit 15

PENGAD 800-631-6989

DEPOSITION EXHIBIT

7

10-31-23

Attachment 3

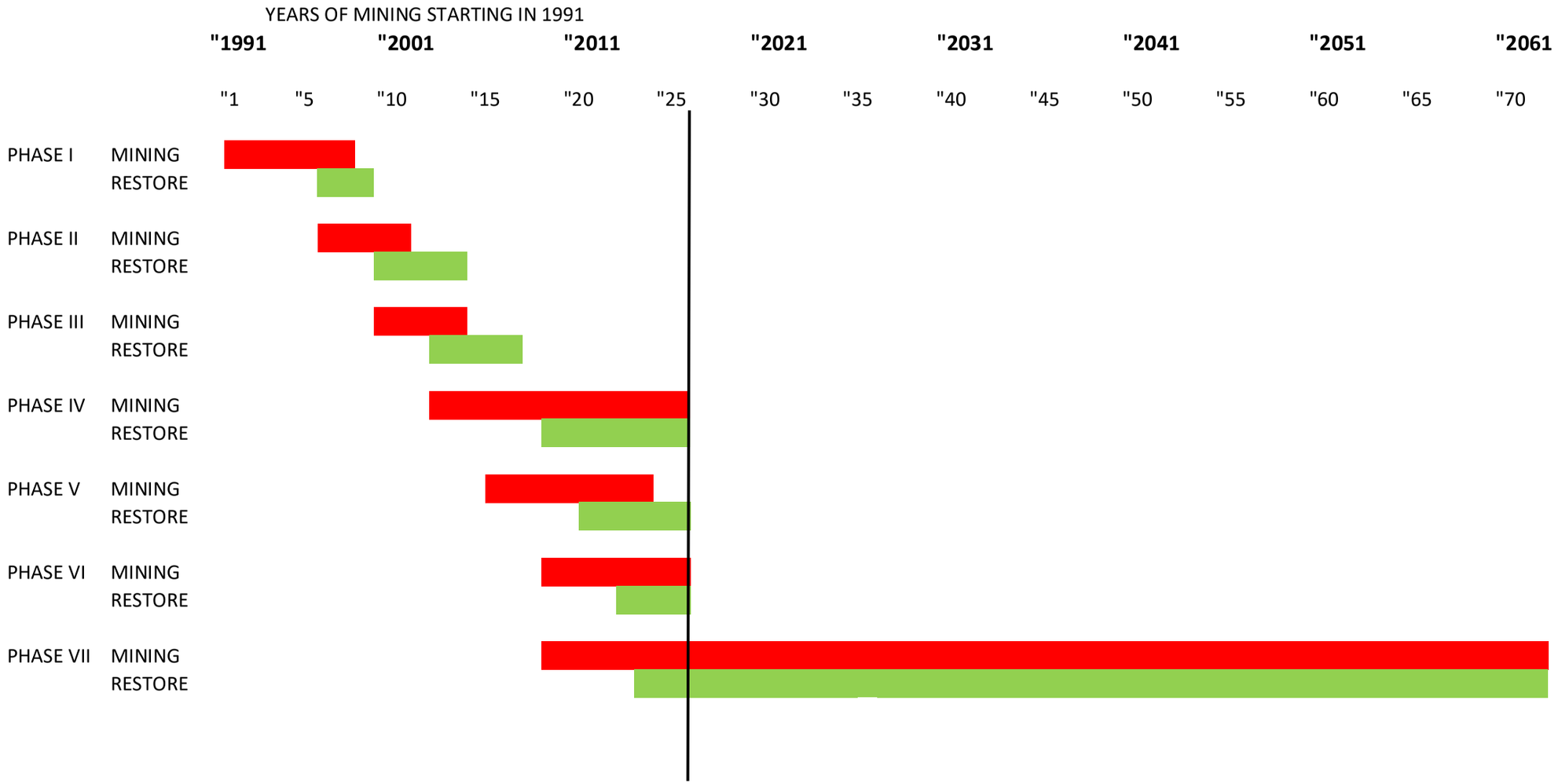
Hearing Exhibit 7

Jim Rudolph Gantt Chart

Visualization of Rieth-Riley Claimed Timeline

SCHEDULE OF MINING AND RESTORATION

RIETH-RILEY CONCEPTION IN 2023



Attachment 4

MSHA Presentation

https://www.msha.gov/sites/default/files/EquipmentGuardingConveyorBelts2010.pdf

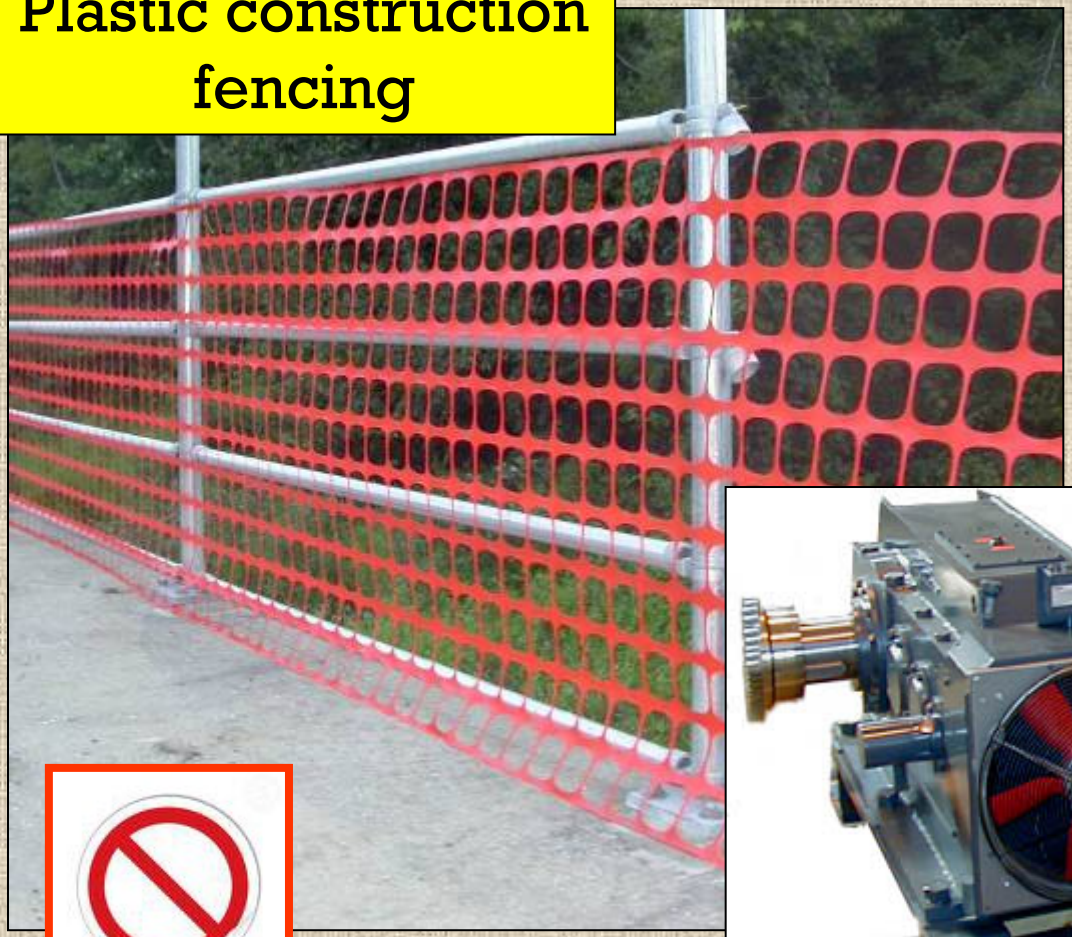
“Guarding Conveyor Belts at Metal and Nonmetal Mines”

Page 33 of Presentation

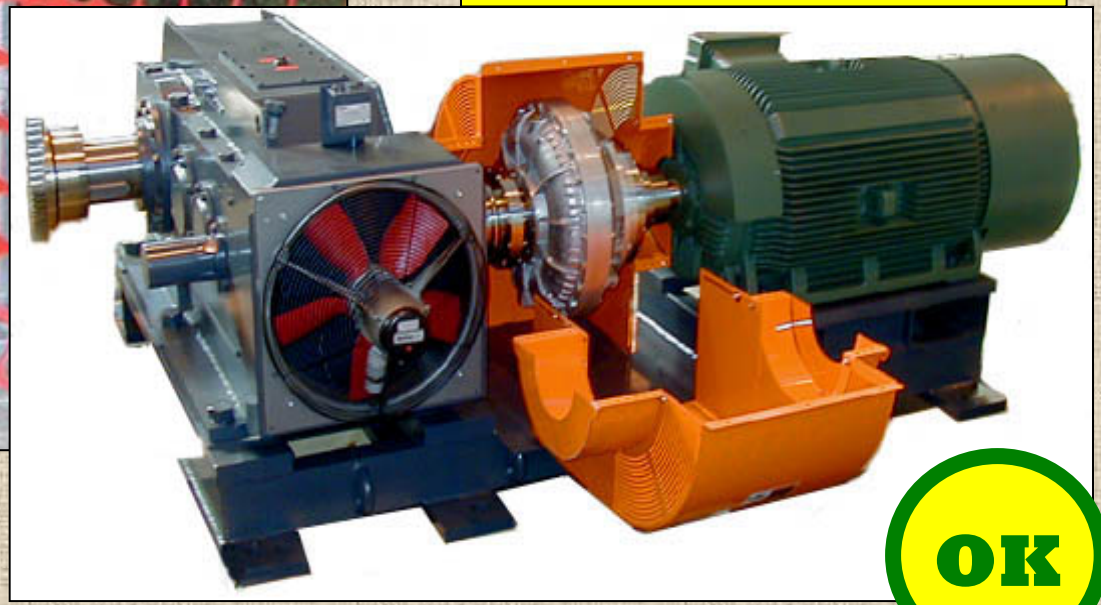
“Plastics”

Plastics

Plastic construction fencing



Custom shapes or cut-to-fit plastic



OK

Attachment 5

Hearing Exhibit 19

Photo 1 of 6

Rieth-Riley Fencing at Green Pit

Attachment 6

Hearing Exhibit 19

Photo 2 of 6

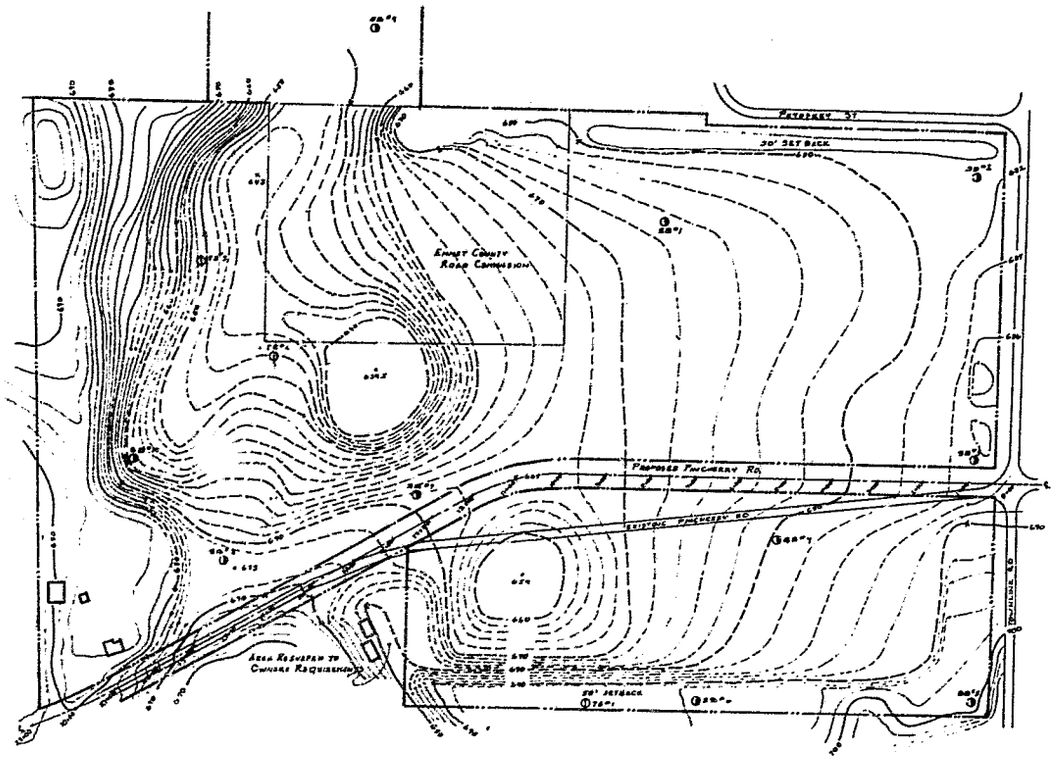
Rieth-Riley Fencing at Green Pit

Attachment 7

Legible Copy of Final Grading Plan

Depicted on Hearing Exhibit 4 Exhibit C

EXHIBIT E



SUMMARY
DEPOSIT DATA

Soil Borings	Proposed Elevation	Ground Water Elevation
B-1	673.5	645.0
B-2	681.0	661.2
B-3	686.0	661.3
B-4	688.2	688.3
B-5	699.3	693.0
B-6	699.1	679.7
B-7	668.0	632.9
B-8	672.7	627.7
B-9	654.0	644.2
B-10	659.0	656.2
Test Borings		
T-1	693.0	UNKNOWN
T-2	676.0	UNKNOWN
T-3	651.0	640.6

SOURCE: THE TRAVERSE GROUP INC.

NOTE:
- FINAL GRADES ARE SUBJECT TO SOME MODIFICATION DUE TO UNFORESEEABLE DEPOSIT CONDITIONS